

**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA**

BILLY GENE CLAYBURN	)	
	)	
Petitioner,	)	
vs.	)	NO. CIV-06-0262-HE
	)	
SAM CALBONE, Warden,	)	
	)	
Respondent.	)	

**ORDER**

Petitioner Billy Gene Clayburn, a state prisoner appearing *pro se*, instituted this action seeking habeas relief.<sup>1</sup> Consistent with 28 U.S.C. §636(b)(1)(B), the matter was referred to Magistrate Judge Bana Roberts, who has recommended that a motion to dismiss filed by the respondent be denied. The magistrate judge rejected the respondent's argument that the petitioner had failed to exhaust his administrative remedies. The respondent has objected to the Report and Recommendation, stating that, while he "moved for dismissal for failure to exhaust," what he was "in-artfully arguing was procedural bar." Respondent's objection, p. 1.

The court has reviewed the motion to dismiss and its principal focus was the petitioner's asserted failure to exhaust. Under these circumstances, particularly when the petitioner did not have the opportunity to address a procedural bar defense, the court concludes the motion should be denied. This ruling will not foreclose the respondent from asserting procedural bar, if appropriate, subsequently.


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<sup>1</sup>*Because the petitioner is challenging the execution of his sentences, the magistrate judge construed the petition as having been filed under 28 U.S.C. § 2241, rather than § 2254.*

Accordingly, the court adopts Magistrate Roberts' Report and Recommendation. The respondent's motion to dismiss [Doc. #10] is **DENIED** and the petitioner's motion to supplement his response [Doc. #12] is **GRANTED**. This matter is referred again to Magistrate Judge Roberts for further proceedings.

**IT IS SO ORDERED.**

Dated this 14<sup>th</sup> day of March, 2007.

  
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JOE HEATON  
UNITED STATES DISTRICT JUDGE